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In the Supreme Court of the United States

OCTOBER TERM, 1947

THE UNITED STATES, PETITIONER

v.

C. B. ROSS COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on December 1, 1947.

OPINION BELOW

The opinion of the Court of Claims (R. 28-32) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on December 1, 1947 (R. 32). A motion for a new trial, seasonably filed, was denied on March 1, 1948 (R. 32). The jurisdiction of this Court is invoked under the provisions of Section 3(b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether an announcement by the Government that it would consider claims, on certain conditions, for reimbursement of existing contractors who had incurred increased labor costs due to the general establishment of a 48-hour workweek by Executive Order No. 9301, constituted a binding contractual offer on which respondent may recover in the Court of Claims.

2. Assuming that a binding contractual offer was made, whether the Court of Claims may overturn or disregard the Government's determination that respondent had not complied with the stated conditions, and therefore was not entitled to reimbursement, in the absence of any proof or suggestion that the administrative determination was fraudulent, arbitrary, or capricious.

CONTRACT PROVISIONS INVOLVED

The terms of the alleged contract involved are set forth in the Appendix, *infra*.

STATEMENT

On December 16, 1942, respondent, a general contractor, entered into a lump sum contract with the United States, acting through the Alley Dwelling Authority, later known as the National Capital Housing Authority (referred to herein as the Authority), a federal agency, for the construction of the Lily Ponds Housing Project, in the District of Columbia (R. 8). The prime contract pro-

vided that the respondent and its subcontractors were to bear all labor costs, and specifically provided that any necessary overtime work was to be "performed without additional expense to the Government" (R. 8). Respondent's agreements with its subcontractors stated that "the parties hereto are aware of the possibility of an increase in the price of labor and materials provided for under this subcontract," and provided that the subcontractor bore the risk of any increase in the price of labor and materials resulting from any cause (including governmental action) and that no claim was to be made therefor for an increase in the subcontract price (R. 9-10).[1]

Respondent submitted its bid on the basis of a 40-hour workweek, with no allowance for overtime, which was to be absorbed in the estimate for overhead and profit. In 1941 and 1942, it had been respondent's practice, in accord with that of other public work contractors, to avoid the use of overtime work as far as possible, and to take care of additional needs for labor by increasing the labor

[1] Four of the nine subcontracts contained specific provisions concerning overtime work. These were that (a) the subcontract price was predicated upon the subcontractor working a 40-hour week, and that if a 48-hour week were necessary, the price would be increased by $2,500 (masonry subcontract, R. 21); (b) the subcontract price was predicated on an eight-hour day, forty-hour week, and the respondent would reimburse the subcontractor for overtime (carpentry subcontract, R. 22); (c) "the bid is based on a 40 hour week" (glazing subcontract, R. 24); (d) the "subcontractor if necessary to keep up with the progress of the job, will work his men forty-eight (48) hours per week in order to accomplish this, without additional cost to the contractor" (electrical subcontract, R. 25).

force during non-overtime hours. This was the practice which was contemplated by respondent and its subcontractors in bidding on this work (R. 10).

The time for completion of performance was 150 days from the date on which respondent was notified to commence work (December 28, 1942), or May 28, 1943, which was postponed by several change orders to September 11, 1943, thus allowing respondent a contract time of 257 days (R. 8, 8-9, 16). Work was commenced about January 1, 1943 (R. 8-9, 14), and the project was accepted by the Authority on September 11, 1943, the last of the 107 days of extended contract time (R. 16). On February 9, 1943, the President issued Executive Order No. 9301 (8 Fed. Reg. 1825) extending the minimum workweek, particularly for contractors with the Federal Government, to 48 hours per week (R. 12). On inquiry, respondent was orally informed by the Authority that the Presidential order required that the contract work be performed on a 48-hour normal workweek, and on May 8, 1943, it received formal written notification concerning the order (R. 12-13). Respondent and its subcontractors commenced to comply with the Executive Order within a week after its issuance, by opening the project to more extensive work on Saturdays (R. 13).

On May 25, 1943, in response to respondent's inquiry concerning reimbursement of additional costs resulting from compliance with the order (R. 17, 34), the Authority wrote that it had been au-

thorized by the Federal Public Housing Authority[2] (of which it was an agent) "to consider claims submitted by lump-sum contractors, who in good faith submitted bids based on a 40-hour week, on certain terms and conditions," subject to the prior approval of the Federal Public Housing Authority (R. 17, 35). The letter stated that the claim must be submitted to the Commissioner of the Federal Public Housing Authority together with (1) a finding of fact by the Alley Dwelling Authority (as it then was) that the contractor based and computed his bid on a 40-hour week; (2) another finding of fact by the Alley Dwelling Authority that the contractor could, at the current rate of progress, complete performance by the designated date by working his employees on a 40-hour week; (3) the contractor's written agreement to a Change Order shortening the construction period on an equitable basis in proportion to the number of hours in excess of 40 that he was required to work his employees; and (4) a recommendation from the Alley Dwelling Authority as to the amount of the claim to be allowed "taking into consideration all savings and overhead and all other savings available to the contractor." It was specifically stated that "The maximum adjustment in any case will be only the amount of the premium pay less all possible savings available to the contractor." The claims of sub-

[2] The functions of the Federal Public Housing Authority were transferred to the Public Housing Administration by Reorganization Plan 3 of 1947, 12 Fed. Reg. 4981, 4983; see 12 Fed. Reg. 5650.

contractors were to be treated in the same way (R. 17, 35-36; Appendix *infra*, pp. 19-22).

Respondent submitted an interim claim on June 25, 1943, and a complete claim, on October 27, 1943, for $19,247.18 (R. 18). The Authority took the position that respondent had not complied with the instructions contained in the letter of May 25, 1943, specifically in that it had not been "shown that the Government benefited materially by the extra work, and that construction time was shortened" (R. 18). Respondent replied that the Authority already had copies of all data which the contractor could supply (R. 18-19). On April 18, 1944, the Federal Public Housing Authority, to whom respondent's data had apparently been forwarded, denied the claims on the ground that review of this data indicated that it would have been necessary for respondent to work his employees 48 hours a week to complete the contract within the specified time, and that the respondent's compliance with Executive Order No. 9301 "was an obligation imposed upon him by the Government acting in its sovereign capacity" (R. 6, 19). After this denial, no further action was taken by respondent with respect to its claim for administrative relief (R. 19).

On August 14, 1944, this suit was brought in the Court of Claims to recover the sum of $19,247.18 for which claim had been made to the Authority (R. 1-7). The petition did not allege any contract-

ual agreement to compensate respondent for its asserted additional costs but relied solely on Executive Order No. 9301 as the basis for recovery (R. 2-5). The Court of Claims held, following its decision in *Clemmer Construction Co., Inc.* v. *United States,* 108 C. Cls. 718, that the respondent was not entitled to reimbursement for additional expense to which it was put by compliance with the Executive Order, since the order was a general sovereign act of the Government (R. 29). The court held, however, that the Authority's letter of May 25, 1943, constituted a special agreement to make reimbursement for these additional costs if respondent fulfilled the four conditions (R. 29-30). Some evidence had been introduced concerning the fulfillment of these conditions, and the court reviewed this evidence for itself. It found that the evidence did not establish "(1) that there was, or was not, a saving of time in the completion of the contract work as a result of the extension of the workweek; or (2) that plaintiff [respondent] could, or could not, have completed the contract work within 257 days, the contract time as extended, if the 40-hour workweek had been continued"[3] (R. 19). Never-

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[3] During the course of performance, the contracting officer frequently complained to respondent of its slow progress, which he attributed to lack of sufficient labor force (R. 15-16). The Court of Claims found that the contracting officer's letters "made little impression on plaintiff's [respondent's] officers" (R. 16).

Although the Government formally accepted the project on September 11, 1943 (R. 16), apparently in order to prevent the imposition of liquidated damages upon respondent which would have followed failure to complete performance on that day, work con-

theless, the court treated the conditions of the May 25th letter as having been satisfied because, as it said, the Government had not considered and passed upon certain requests for extensions of time which respondent had made; this failure of the Government, the court held, made it impossible to determine whether respondent had fulfilled the conditions (R. 30). The time requests which the court held had not been properly considered by the Authority were made relatively early in the course of construction and consisted of (1) extensions totalling nine days for inclement weather, and (2) requisite time (with no specific number of days set forth) for inability to obtain needed materials (R. 15). The court found that throughout the performance of the contract the Authority assured respondent that it would be granted all extensions of contract time to which it was entitled, and respondent anticipated that such extensions would not be worked out and finally determined until the project was approaching completion (R. 16). There is no finding, however, that respondent ever pressed for action upon the time requests noted above, or called them to the attention of the contracting officer or of the Authority, at the time

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tinued on the project at least until October 13, 1943; respondent's claim includes overtime until that date (R. 13, 14). Paragraph 2 of the Special Conditions of the Contract authorized the contracting officer to accept the work upon substantial completion, provided that "in such case the contractor shall not be charged with liquidated damages but the Government may assess the actual damages caused by such delay."

other extensions were granted or when the project was approaching completion.

Judgment was entered for respondent in the sum of $16,209.75, the court limiting the reimbursement to the premium pay paid for Saturday work (R. 32).[4] The major part of this recovery was for the benefit of eight of respondent's subcontractors (R. 19-27, 32).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that the United States contracted to reimburse respondent for its increased labor costs.

2. In failing to give finality to the administrative determination that respondent had not met the conditions prerequisite to reimbursement for increased labor costs.

3. In failing to hold that the administrative rejection of respondent's claim for increased labor costs was final and conclusive.

4. In awarding increased labor costs to respondent in the absence of any finding or evidence to justify such award.

5. In calculating the amount of the award to the respondent without any regard to the method of

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[4] The opinion states: "We think it has not been shown that the job was kept open for overtime on other days or open at all on Sundays, in order to make possible a 48-hour week" (R. 31).

calculation which formed an integral part of the claimed adjustment in issue.

6. In giving judgment for respondent.

REASONS FOR GRANTING THE WRIT

The Court of Claims recognizes here (R. 29), as it expressly held in *Clemmer Construction Co.* v. *United States,* 108 C. Cls. 718, that a lump sum government contractor cannot secure reimbursement, under his contract or through the courts, for additional expenses incurred because Executive Order 9301—a "general, sovereign act of the Government" (R. 29)—established a 48-hour workweek for wartime industry. But the court reaches that very result by first converting the Federal Public Housing Authority's [5] announcement that it was willing (like the War and Navy Departments) to make such reimbursement as a matter of grace into a binding contractual offer accepted by respondent, and by then disregarding the agency's finding that respondent had failed to comply with the essential conditions prerequisite to all such adjustments. This holding improperly confers litigable rights upon contractors in areas in which it had hitherto been thought that the sole source of relief was the Government's bounty and the contracting agency's discretion.

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[5] In this matter, as with the entire contract, the National Capital Housing Authority was acting as agent of the Federal Public Housing Authority, which reserved to itself the right to approve all adjustments. *Supra,* p. 5; R. 8, 17; Appendix, *infra,* p. 19.

1. The Authority's letter of May 25, 1943, was simply an announcement of the method by which that agency would consider requests for administrative relief from additional expense attributable to the institution of the 48-hour week; it did not constitute an "offer" for a unilateral contract to be "accepted" by respondent's compliance with the letter's conditions.[6]

a. Under Title II of the First War Powers Act, 1941 (Act of December 18, 1941, c. 593, 55 Stat. 838, 839, 50 U. S. C. App., Supp. V, 611), and Executive Order No. 9001 (dated December 27, 1941, 3 CFR, 1941 Supp., pp. 330-332) certain war contracting agencies were authorized, where the prosecution of the war would be facilitated, to grant relief under war contracts, even where the contractor had no legal claim or furnished no legal consideration. This authority was widely used by the War and Navy Departments to award monetary and other contractual relief as a matter of grace,[7]

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[6] The terms of the letter of May 25th were not unique to the Alley Dwelling Authority or to this contractor, but were substantially the same as the general instructions, concerning claims for reimbursement for additional expense due to Executive Order No. 9301, which Federal Public Housing Authority had issued to its regional offices in April, 1943. Federal Public Housing Authority, Manual of Policy and Procedure: Instructions to Regional Offices, Sec. 3510:1, pars. 6 and 7.

[7] See 40 Op. Atty. Gen. No. 53, August 29, 1942, for the liberal construction of Title II of the First War Powers Act which was followed by the War and Navy Departments from 1942 until V-J Day. Discussion and description of the use of the Act in granting relief to war contractors is contained in Rowley, *The First War Powers Act Cases*, appearing in Shepherd, *Cases and Materials on the Law of Contracts* (2nd Ed., 1946), pp. 1233-1238; Kramer, *Extraordinary*

and, in particular, to reimburse lump-sum contractors for increases in performance costs due to Executive Order No. 9301. The Joint Statement of these two departments, issued April 1, 1943 (partially reprinted at R. 4-5; 10 CFR Cum. Supp. Sec. 81.988) indicated that in cases of hardship "the War Department and Navy Department will give consideration in appropriate cases to granting relief from such hardship," and that, in general, "it will be regarded that hardship exists only in cases where the increase in the cost of performance * * * operates to deprive the contractor of a fair profit on the contract" 10 CFR., Cum. Supp. Sec. 81.988.

The Federal Public Housing Authority adopted a similar policy of according relief under the First War Powers Act to war housing contractors adversely affected by Executive Order No. 9301, and the Alley Dwelling Authority's letter of May 25, 1943 did no more than inform respondent of the administrative steps to be taken in petitioning for that discretionary relief.[8] Until the contracting

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Relief for War Contractors (1945), 93 U. of Pa. L. Rev. 357; and Fain and Watt, *War Procurement—A New Pattern in Contracts* (1944), 44 Col. L. Rev. 127, 194 *et seq.* For the War Department's regulations on the granting of such relief, see War Department Procurement Regulations, pars. 308a-308g, 1252, 10 CFR, Cum. Supp., Secs. 81.308a-81.308g, 81.1252.

[8] Executive Order No. 9116, March 30, 1942, 3 CFR Cum. Supp., pp. 1131-2, extended the provisions of Title II of the First War Powers Act and of Executive Order No. 9001 to the National Housing Agency (of which the Federal Public Housing Authority then formed a part) and authorized the National Housing Agency to delegate these powers to its constituent agencies. By a general order dated April 8, 1942, Subject: Extension of Provisions of Executive Order No. 9001 of December 27, 1941 to Contracts of the FPHA, the

agency—be it the War or Navy Department or the Federal Public Housing Authority—actually modified or amended the contractor's agreement, he had no legally enforceable claim to reimbursement, but merely a privilege to seek such discretionary relief through administrative means. It is both novel and highly disturbing for a court to hold that an agency's announcement, for the convenience of its contractors, of the procedure and the internal rules governing these grants of extraordinary relief under the First War Powers Act constitutes a binding "offer," which a contractor may "accept" and turn into an enforceable contract by following the designated requirements.[9]

b. The First War Powers Act wholly aside, the letter of May 25, 1943 can hardly be deemed more than an invitation to submit a proposal for a supplementary agreement. As the court below admitted, the contracting agency was under no legal compulsion to make compensation under the original contract; and it plainly reserved to itself the full right of allowance or disallowance of all "claims" for "adjustment." The Federal Public Housing Authority was to "consider" the claim in the light of

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Administrator of the National Housing Agency delegated this authority to the Federal Public Housing Commissioner with respect to war contracts made by the Federal Public Housing Authority.

[9] In *Clemmer Construction Co., Inc.* v. *United States*, 108 C. Cls. 718, 723-724 (likewise involving a National Housing Agency contract for war housing), the Court of Claims itself referred to a contracting agency's award of relief for increased costs due to Executive Order No. 9301 as an "exercise of its discretion," and clearly intimated that the matter was one for executive relief.

two findings of fact and a recommendation by the Alley Dwelling Authority; a "maximum," but not a "minimum," "adjustment" was announced, and the factors to be taken into consideration were specified, but there was no mathematical formula established. These are not the terms of an "offer," ready for acceptance, but at most a proposal for negotiation of a supplementary agreement, such as is frequently made by one or the other party to government contracts. If the supplementary agreement were consummated, the United States would, of course, be liable, but the two contracting agencies of the Government retained the power to determine for themselves whether to enter into such an agreement and on what terms; and here that determination was in the negative. In short, it distorts the language of the May 25th letter and disregards the non-contractual nature of the respondent's "claim" to see in the Authority's letter a firm offer subject to acceptance by acts which a court will later hold to be sufficient.

2. Even on the erroneous assumption that the critical letter contained a legally binding offer, the Court of Claims compounded its error by undertaking to decide whether respondent had fulfilled the offer's conditions, when it is plain from the letter's terms that that was the prerogative of the two contracting agencies. These agencies, and not the courts, were to make the ultimate supplemental contract. The Alley Dwelling Authority was ini-

tially to determine whether (1) the contractor based his bid on a 40-hour week, and (2) the contractor could have completed timely performance on a 40-hour week. The same Authority was to recommend the allowable amount, and the claimant was to supply a written agreement shortening the contract completion period "on an equitable basis." On the basis of these findings, recommendation, and agreement, the Federal Public Housing Authority was to make the final award, and there is no provision for, or suggestion of, a later judicial scrutiny. Such contract provisions authorizing one party to be the final judge of the satisfaction and quality of the other contractor's performance are, of course, wholly unexceptionable.[10] The adverse findings by the government agencies that no benefit to the United States had been shown should therefore have conclusively fixed respondent's failure to comply with the stated conditions.

When it undertook, in disregard of these settled principles, to weigh the evidence of compliance for itself, the court below came to the same conclusion as the administrative agencies. It found that respondent had established neither that there was a saving of time in the completion of the contract as

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[10] *Kihlberg* v. *United States*, 97 U. S. 398; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549; *United States* v. *Gleason*, 175 U. S. 588, 605-8; *Ripley* v. *United States*, 223 U. S. 695, 701; *Plumley* v. *United States*, 226 U. S. 545; *Merrill-Ruckgaber Company* v. *United States*, 241 U. S. 387; *United States* v. *John McShain, Inc.*, 308 U. S. 512, 520; *United States* v. *Callahan Walker Construction Co.*, 317 U. S. 56; *United States* v. *Blair*, 321 U. S. 730; *United States* v. *Joseph A. Holpuch Co.*, 328 U. S. 234.

a result of the workweek's extension, nor that it could have finished performance within the contract time (as extended) if the 40-hour week had been continued (R. 19). Judgment was, nevertheless, awarded for respondent, on the sole ground that the Government had failed to consider certain requests for extended time made early in the respondent's performance. (See *supra,* pp. 7-8).

This was an issue which had not been raised by respondent at any time, nor had it been tried, and the lower court was not justified in seizing upon the absence of any evidence of the Government's consideration of these requests as sustaining the inference that the contracting officials had neglected to pass upon them and thus failed in an official duty. So far as the record and the findings reveal, respondent never pressed for action on these early time extensions, and, if the point were available at all in the court below, the readier inference would be that these requests either duplicated periods covered by those extensions which were granted (R. 15-16), or were tacitly withdrawn by respondent, or were considered in the administrative determination that the construction time had not been shortened by adoption of the 48-hour week. Moreover, on the court's own findings, these time requests were irrelevant to the issue of respondent's compliance with the designated conditions. The contract time (as extended) expired on September 11, 1943 (R. 16), but respondent was still perform-

ing work under the contract on October 13, 1943, 32 days later (R. 13);[11] even if the allegedly ignored time requests were added to the extended contract time, it is highly improbable that they would bring the final date up to October 13.[12] It is still more improbable that a contractor which needed all this time to complete performance on the 48-hour week basis could have finished within the same period on a 40-hour schedule; and, *a fortiori,* respondent could never have complied with the essential prerequisite that it shorten the construction period substantially before becoming eligible for relief. Thus, even the narrow ground of the actual holding is without support in the findings and contravenes the most significant term of the alleged contract which the court claimed to be enforcing.

3. Litigation by government contractors who have been administratively denied relief will undoubtedly be stimulated by the holding below that a contracting agency's rules regulating the allowance of discretionary relief constitute a con-

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[11] The project was apparently accepted on September 11, 1943, in order to save respondent from being penalized by the imposition of liquidated damages. (See fn. 3, *supra,* pp. 7-8). The Court of Claims' opinion, but not its findings, states that the last of the projects's buildings had been accepted by August 31, 1943 (R. 29), but the court's findings, as well as the testimony, indicate that respondent had not finally completed the project before October 13, 1943, and that significant contract work remained to be done after September 11. Since the project involved war housing, the Government was especially anxious to be able to use the project buildings as early as possible.

[12] One request was for nine (9) days for bad weather; the others were for "requisite time for inability to obtain needed materials" (R. 15).

tractual offer whose acceptance will be judicially determined. The Public Housing Administration alone anticipates at least twenty-five similar suits against the United States by contractors who have failed to secure reimbursement for excess costs due to the 48-hour workweek. The instant decision also gravely undermines the finality of the hundreds of War and Navy Department denials of requests for relief of all kinds under the First War Powers Act, during the years from 1942 through 1945. For the logic of the Court of Claims' opinion would read the detailed provisions of the War Department Procurement Regulations concerning First War Powers Act relief (Procurement Regulations, Pars. 308c-308g, 988, 1252, 10 CFR Cum. Supp., Secs. 81.308c-81.308g, 81.988, 81.1252) as a binding offer, permitting any contractor to prove his acceptance by showing in the Court of Claims that he was improperly denied relief under these rules. In our view, even the prospect of such a result warrants the intervention of this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1948.

May 25, 1943.

The Alley Dwelling Authority for the District of Columbia, Washington, D. C.

C. B. Ross Company, Inc.
Two Lafayette Street,
New York, N. Y.

Re: 48 Hour Work Week. Executive Order No. 9301

GENTLEMEN:

This will acknowledge receipt of your letter of May 19, in which you acknowledge receipt of our letter of May 8, inviting your attention to Executive Order No. 9301, relative to the 48 hour work week and in which you informed us that you have been complying with the said Executive Order and request information as to the procedure you are to follow in claiming reimbursement for additional costs occasioned by you as a result of complying with the Executive Order.

The Alley Dwelling Authority has been advised by the Federal Public Housing Authority to consider claims submitted by lump-sum contractors, who in good faith submitted bids based on a 40 hour week, on certain terms and conditions. In the case of lump-sum contracts between the contractor and the Alley Dwelling Authority, acting as principal, claims for additional compensation submitted by the contractor to the Alley Dwelling Authority may not be approved until the prior approval of the Federal Public Housing Authority has been secured. The claim shall be submitted to the Commissioner of the Federal Public Housing Author-

ity together with certain findings and recommendations set forth below:

(1) That the Alley Dwelling Authority has made a finding of fact that the contractor based his bid on his employees working 40, 42, or 44 hours per week, as the case may be, and that he computed the amount of his bid on a week of that length. This will involve an examination of certified copies of the contractor's original computation sheets, work sheets and estimates.

(2) The Alley Dwelling Authority must make a finding of fact that at the current rate of progress the contractor can complete the performance required under his contract and meet the contract completion date by working his employees 40, 42, or 44 hours per week, as the case may be. This will involve analysis of payroll records and all periodical reports.

(3) The contractor's agreement in writing to a Change Order shortening the construction period on an equitable basis in proportion to the number of hours in excess of 40, 42 or 44 hours per week that he is required to work his employees in consideration for the extra compensation which he will receive therefor.

(4) The Alley Dwelling Authority shall recommend the amount of the claim to be allowed, taking into consideration all savings and overhead and all other savings available to the contractor. It follows that an earlier completion date should result in savings to the

contractor in the matter of rental of equipment, salary and supervisory and office employees and other savings.

The maximum adjustment in any case will be only the amount of the premium pay less all possible savings available to the contractor. For example, when a contractor increases from a contemplated 40 hour week to a required 48 hour week and is compelled to pay his mechanics and laborers time and one-half, or the same amount for the extra 8 hours as he had for 12 hours regular work, adjustment shall be considered not on the basis of 12 hours, but only on the basis of 4 extra hours, which is the amount of premium pay for the overtime work.

The last paragraph of your letter requests advice as to the procedure you are to follow in connection with the claims made by your subcontractors for additional costs due to complying with provisions of Executive Order No. 9301. The Alley Dwelling Authority has not been advised specifically as to this point, but it seems logical to assume that you should follow the same procedure with your subcontractors as set out herein for you to follow when presenting your claim to The Alley Dwelling Authority. When this point is definitely established, you will be advised accordingly.

You will be interested to learn that the name of The Alley Dwelling Authority will be changed to the National Capital Housing Authority, effective as of June 1, 1943. The new title was given by Executive Order and more accurately describes the work of this agency.

Yours very truly,

(S.) JOHN IHLDER,
JOHN IHLDER,
Executive Officer.

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IN THE

Supreme Court of the United States

THE UNITED STATES,

—against—

C. B. ROSS COMPANY, INC.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below

The opinion of the Court of Claims (R. 28-32), has not yet been reported in the Court of Claims Reports but can be found in 74 Fed. Supp. 420.

Jurisdiction

The judgment of the Court of Claims was entered on December 1, 1947 (R. 32). A motion for a new trial was denied on March 1, 1948 (R. 32). The jurisdiction of this Court is invoked by Petitioner under the provisions of Section 3(h) of the Act of February 13, 1925, as amended.

Questions Presented

The Petitioner's statement of the alleged questions presented on this application is reminiscent of the old tactic of setting up a straw man so that the erector may easily knock him down. Such yeoman service does the Petitioner render to the Respondent when Petitioner would have it

appear that important questions of law are presented by the record in this case. The instant case is *sui generis* on the peculiar facts of our case and no argument by Petitioner can transform it into a class suit involving basic legal issues. Perhaps, in view of the apparent effort of the Petitioner to overstate the questions presented, it will be best to state the question in the language of the Court of Claims, *viz.*:

> "The plaintiff here, however, claims that the Government agreed to compensate it. The Government concedes that the Government agency which made the contract had the power to agree to reimburse the plaintiff, but says that it did not so agree, but only offered to do so if the plaintiff would satisfy certain conditions which, it says, the plaintiff did not do. We think the plaintiff did satisfy the conditions. The only one seriously in question is the one with regard to shortening the time of performance" (R. 29).

As indicated by the above, the sole question in the case was whether the conditions of the agreement were satisfied.

Statement

On or about December 16, 1942, Respondent as lowest competitive bidder entered into a contract with the United States acting through the Alley Dwelling Authority[1] for the construction of the Lily Ponds Housing Project, Washington, D. C. Respondent's claim arises out of the Govern-

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1 The name was later changed to "National Capital Housing Authority"; for convenience the name Alley Authority will be used throughout this brief interchangeably with the name "National Capital Housing Authority".

ment's requirement that Respondent work its forces and those of its subcontractors on a 48-hour per week basis, instead of a 40-hour per week basis. The Court of Claims found that the Respondent prepared and submitted its bid on the basis of a work week of 40 hours, with no allowance for overtime, that being consistent with the practices and principles then prevalent on public work (R. 5). Respondent contended (and it was so found by the Court) that in order to accomplish a work week of 48 hours, any work performed after 5 o'clock on Friday and before 8 A.M. Monday, was overtime, and paid for at 1-1/2 times the regular rate.

The overtime question came about in the following manner: On February 9, 1943, Executive Order 9301 (8 F. R. 1825) was promulgated. It provided in part as follows:

> "1. For the duration of the war, no plant, factory or other place of employment shall be deemed to be making the most effective utilization of its manpower if the minimum workweek therein is less than 48 hours per week.
>
> 2. All departments and agencies of the Federal Government shall require their contractors to comply with the minimum workweek prescribed in this order and with policies, directives, and regulations prescribed hereunder, and shall promptly take such action as may be necessary for that purpose."

Immediately after the issuance of Executive Order 9301, Respondent orally inquired of the Alley Authority representatives at the site of the work whether it would require the contract work to be put on a 48 hour work week. Respondent was thereupon advised that it would be required to go on a 48-hour work week, and upon requesting a writ-

ten order directing it to so proceed, the Alley Authority's representatives stated that the order would come through in due course. On May 8, 1943, the order actually was issued by the Contracting Officer in charge. Within a week of February 9, 1943, Respondent had called its subcontractors together, told them of the foregoing requirements, and instructed them to comply (R. 12 and 13).

Saturday or Sunday was generally considered and accepted as the sixth day of a 6-day 48-hour work week by both plaintiff and its subcontractors and the laborers and mechanics employed by them. It is conceded that the 48-hour work week was so interpreted by the building trades; that no matter how few hours a mechanic or laborer worked between Monday and Friday, he nevertheless was paid time and a half if he worked Saturday or Sunday. This in spite of the fact that it was the experience in the building trades generally that efficiency on the sixth day dropped, it being estimated that the drop on the Lily Ponds Project was 25% (R. 14). Thus, the effect of the order to put the work on a 48-hour weekly basis was not only more costly insofar as the wages paid on Saturdays and Sundays were concerned, but the labor productivity received for paying time and a half was far below that paid for at the regular rate.

Apparently the Alley Dwelling Authority recognized the validity of the Respondent's claim, for when Respondent received the order to proceed on a 48-hour a week basis, and then wrote to the Alley Authority under date of May 19, 1943, requesting that it be advised how the additional costs were to be paid, and whether payment would be made from time to time or at the conclusion of the job, the Contracting Officer advised Respondent by letter dated May 25, 1943, under what circumstances payment would be made.

The conditions were that *the Alley Authority* make findings that:

1. The Contractor based his bid on a 40-hour week.

2. The Contractor could at the current rate of progress, complete the contract within the required time by working a 40-hour week.

3. The Contractor agrees in writing to a change order shortening the construction period on an equitable basis.

From time to time Respondent submitted its statement of additional costs necessitated by the overtime order, and on October 27, 1943, submitted its complete claim in the amount of $19,247.19.

There then followed some correspondence in which the Alley Authority took the position that Respondent had failed to show that the Government had benefited by the 48-hour work work or that the construction time was shortened (R. 18-19).

It is highly significant that the Alley Authority for the first time annexed the new condition "that it had not been shown that the Government benefited materially by the extra work". This was no part of any prior agreement written or oral.

Thereafter and on January 31, 1944, the Alley Authority wrote the Respondent requesting further information. On March 23, 1944, Respondent's attorneys wrote to the Alley Authority requesting a review of the evidence already submitted.

Again it is highly significant *that the Alley Authority made no findings whatsoever* and instead turned the entire matter over to the Regional Director of the Federal Public

Housing Authority with the result that under date of April 18, 1944, it forwarded to Respondent a copy of a ruling received by it from the Regional Director denying the claim on the following grounds (R. 5-6):

> "1. In order for the contractor to have completed his work under his contract within the time specified, it would have been necessary for him to have worked his employees 48 hours a week; and
>
> 2. The National Capital Housing Authority did not issue any orders requiring the Contractor to work his employees 48 hours per week. The Contractor's compliance with the aforementioned Executive Order was an obligation imposed upon him by the Government acting in its sovereign capacity."

The Court of Claims found that the Respondent satisfied all the conditions, stating:

> "We think the Plaintiff did satisfy the conditions. The only one seriously in question is the one with regard to shortening the time of performance. While it is impossible to determine with exactness just how much time the Plaintiff was entitled to for completion of the contract, the Government has caused this situation by its failure to do what the contract required of it" (R. 29-30).

It is most significant that after the judgment of the Court of Claims the Government moved for a new trial and urged that the error of the Court of Claims lay:

> "1. In upsetting the Finding of the National Capital Housing Authority that Plaintiff had not met the

terms and conditions specified as a prerequisite to reimbursement."

The Government's application was without basis *because of the fact that the record is completely devoid of any evidence that the National Capital Housing Authority which was in charge of the job, ever made any Findings whatsoever.*

The record is clear that (1) Respondent completed well in advance of the allotted time (2) the National Capital Housing Authority not only failed to make any Findings as provided for by the letter of May 25, but even failed to act on any requests for extensions of time made by the Respondent. In an effort to circumvent these facts Petitioner would have it appear that the Court of Claims acted merely because of the Authority's failure to show what the facts were. We will show that contention to be without merit. The Court of Claims found as a fact that the Plaintiff not only satisfied all the conditions of the letter of May 25, and that if there were any doubt about it the fault lay with the Government because of its failure both to perform its contract functions or to show the contrary of what Respondent testified to. We will show that there could have been no conceivable question as to the fact that the respondent had completed long before the acceptance date of September 11, and that the action of the Government in this case was not only arbitrary but capricious in the extreme.

Reasons for Denying the Writ

Respondent has contended throughout that in putting the work on a 48-hour work week basis it did so on the oral and written directions and promises of the Alley Author-

ity. Apparently the Government conceded as much for it urged in the Court below that there were no sanctions whatsoever attached to failure to comply with Executive Order 9301.[2] Accordingly, the Government throughout was forced to concede that if the evidence indicated that it directed Respondent to comply with the 48-hour work week and if there was inherent in said direction a promise of payment upon conditions therein outlined payment should be made.

It is respectfully submitted that the Court having found as a fact that orders were given and a promise of payment made (even if we assume it was a conditional promise) the Government was properly held liable if the conditions were actually complied with. We are not dealing, as suggested by the Petitioner at page 15 of his instant brief, with questions of quality or personal satisfaction as to work performed. On the contrary, we are dealing with the question as to whether or not an agreement conditional or unconditional has been complied with. Surprisingly enough Petitioner wholly overlooks the fact that the Alley Authority which was required by its letter of May 25th *to make the requisite findings never made any determination.* So obvious was the justice of Respondent's position that the Alley Authority did nothing and passed the buck to the Regional Director.

In nearly every case before the Court of Claims where a determination as to performance is involved, we have findings made by the Contracting Officer or by the Agency in charge of the work and then the decision of Head of the Department on appeal by the Contractor. But in this case, the very primary findings were never made and yet the Petitioner now has the temerity to assert that the

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2 Note page 145 of the Government's Brief in the Court of Claims.

Court of Claims may not examine the facts and arrive at a conclusion as to whether the requisite conditions of the agreement were performed, even though the agreement provided that the Contracting Officer was to make such findings and it failed to do so.

In order to avoid the effect of the finding made by the Court of Claims that an order was given and promise of payment made, even though conditional, the Government now distorts what happened and would suggest that all the Government did was to negotiate or to make a proposal for negotiation of a supplementary agreement and that during all this time the parties were simply considering whether or not to enter upon an agreement and upon what terms to do so. Thus by the simple device of referring to the agreement to pay if conditions were fulfilled as an agreement which but seeks ultimately to make a supplemental contract, Petitioner now argues that the Court of Claims was in error when it undertook to decide what the terms of that supplemental contract were to be. The science of semantics was never more abused. The Court did not undertake to decide what the terms of the agreement should be. The Court of Claims merely held that an agreement existed, albeit a conditional one, and under the circumstances properly considered whether the conceded conditions of the agreement had been complied with. It having appeared that the Government failed to take the necessary steps so that an equitable decision might be had as to whether or not the conditions of the agreement had been complied with, the Court of Claims did the only thing it could do under the circumstances and that was weigh the evidence and determine from it whether or not the conditions had been in fact complied with. Petitioner would give this Court the impression that the Court of Claims held the conditions complied with simply because the Government had failed

to act in considering certain requests for extensions of time. That is not the fact. The Court of Claims went into the entire record and from it determined that the conditions had been complied with. In an effort to avoid the effect of the record, Petitioner now makes the most unfair argument that the Respondent was still performing the contract on October 13, 1943, even though the contract had been fully accepted as of September 11, 1943. The work after even Sept. 1 was merely the usual cleaning up and patching items which never hold up acceptance. That was never disputed at the trial.

It was conceded that there were only 500 dwelling units in the entire project. Exhibits 37 to 49 are a summary of the Authority's letters showing when each of the 500 units were accepted. These letters show that the Authority had concededly accepted all of the buildings as of September 1st and had accepted over 400 of the 500 dwelling units as of July 29 (Exhibit 46) and as of August 6 had accepted 476 (Exhibit 47). *This was 36 days in advance of the so-called final acceptance date of September 11, 1943.*

In view of all this, the Record cries aloud that the Regional Director was not only arbitrary in his view, but that he had closed his eyes to the entire situation. How he could conceivably have ruled that the Contractor would have been compelled to work a 48-hour week if it were to complete on time is incomprehensible in the light of the Contracting Officer's own letters indicating actual acceptance of 95% of the dwelling units by August 6th, 36 days ahead of the final certificate date. This August 6th date is the Government's date, not ours. It needs but little imagination to realize that actual completion precedes by a considerable number of days the Government Inspector's recognition of completion.

Bearing in mind the state of completion at the known dates, we have but to ask ourselves, what would have been

the Contractor's position had he failed to complete within time? Addenda No. 2 attached to the contract, being Exhibit "1", indicates that the liquidated damages for delay was $1.00 per dwelling unit per day. This is found under the first paragraph of Addenda No. 2 as follows:

> "SPECIAL CONDITIONS, Page 42, Art. 2, Liquidated Damages, Line 7, after 'One ($1) dollar', insert 'per dwelling unit per day'."

By August 6th there were but 24 units still to be accepted, and for which the Contractor was still responsible. Thus $24. per day would have been the limit after August 6th. Even if we took an additional 36 days, the limit of our damage would have been less than $1,000. Yet the Court found we spent at least $16,209.75. Is it then reasonable to assume that having almost 36 days left with 24 units to deliver that the Contractor could not have finished the job within the contract time had it worked 40 hours a week? This, of course, takes no account of all the other requests for extensions of time which the Alley Authority did not act on. It is obvious that neither the Alley Authority nor the Regional Director made any serious effort to consider the matter on the merits, but rather relied on their contention that the Government acted in its sovereign capacity.

How far the Director went in his complete disregard of the facts is best evident from the Regional Director's statement that the Authority did not issue any order requiring the 48-hour week. Firstly, the Authority itself never made such a claim. Secondly, it was in direct contradiction of the Authority's letters which clearly directed the 48-hour week.

Petitioner contends that it was incumbent upon us to prove that the requests for extensions were meritorious.

To begin with, the record shows that we were so far ahead of the contract time, even without the extensions, that the Authority's finding was purely arbitrary. Secondly, even if we were to assume that it was incumbent upon us to show that our requests were meritorious, the Record indicates that very fact. The Authority's daily reports were at the trial. We offered a number of them to show that our requests for weather extensions were in order. We could do no more. As the Government now states, in its brief, these extensions alone would have given us an additional nine days. Certainly in 1943 there were excusable delays in obtaining materials which would have entitled us to some extensions had the Authority performed its duty and acted thereon. If only five days were involved this would have brought the official completion date to some time in October.

It seems to us that the "contract time" as applied in this case, has created much confusion. As we have heretofore shown, the instant contract provided for the imposition of liquidated damages of $1.00 per dwelling unit per day. That was in recognition of the fact that the Government would and was taking part of the project over for actual occupancy months before it took over the last unit. In the light of this situation it would, of course, be a misnomer to say that the contract as such was not completed until the last day when the last unit was accepted. Rather must we view this job from the standpoint of the condition of the job at the various times the units were taken over. We now know definitely that as of August 6th, 476 of the 500 units were accepted by the Government for occupancy. Concededly the Contractor had until September 11th to finish without giving any consideration to the requests for extensions which were not acted upon. If the Contractor took 30 days beyond the September 11th date he would have to pay liquidated damages of $24.00 per day or $720. at most.

Does that in any equitable or legal sense counterbalance the $16,209.75 damages found by the Court? The question answers itself. Furthermore, all units were accepted by the Government as of September 1st, ten days before the official date of September 11th. It is therefore but fair to infer that these ten days plus the other extensions to which plaintiff was entitled would easily have absorbed any and all work performed by the Contractor on Saturdays or Sundays, with all the attendant inefficiency and lack of production on these overtime days. As the Court stated in its findings, the efficiency had been known to drop 75%, and on Lily Ponds it was estimated at 25% (R. 14). The trouble was that the National Capital Housing Authority really made no effort to review this phase of the case, but rather relied on the Regional Director's ruling that it had a right to order the work in the Government's sovereign capacity.

Respondent made every effort to show that the Regional Director was in error, as that was exactly what was in issue throughout. Most glaring is the fact that the Government had Mr. Isham, Chief Field Supervisor for the National Capital Housing Authority, on the witness stand. If the Government intended to urge that the overtime was necessary in order to complete on contract time or to avoid liquidated damages, that should have been elicited from Mr. Isham, but the fact is that no attempt in that direction was ever made. Having had the opportunity to contradict Respondent's direct evidence by the very man whom it placed in charge of the field work, and having failed to do so, it seems to us that Petitioner's present argument comes in poor grace.

In conclusion we beg leave to refer to Petitioner's argument at the closing of his brief that litigation by government contractors who have been administratively denied relief will undoubtedly be stimulated by the holding of the

Court of Claims that a contracting agency's rules regulating the allowance of discretionary relief constitute a contractural offer whose acceptance will be judicially determined.

Here again the Petitioner attempts to involve us in a class litigation when the fact is that our case is *sui generis* in the most absolute sense in which that term can be used. The trouble with the Petitioner's argument is that it involves a complete misstatement of what happened here. We are dealing in the instant case with a situation where the contracting officer, both orally and in writing, directed the work to proceed on a forty-eight (48) hour basis with a promise of a payment (R. 12). Thereafter the contracting officer advised Respondent as to what conditions Respondent must meet before payment will be made. It may well be that having ordered the work to proceed and having promised payment, the contracting officer had no right to impose any conditions. But we do not presently urge that point. We do say, however, that having laid down certain conditions, namely, that the contracting agency make certain findings, it was incumbent on the contracting officer to make the findings in a fair and equitable manner. If the contracting officer failed to make the findings, as in the case at bar, or if the contracting officer acted in an arbitrary or capricious manner, the Court of Claims had a right to step in and act.

To argue as Petitioner does that the instant judgment of the Court of Claims greatly undermines the finality of hundreds of War and Navy Department denials of request for relief only raises the usual bugaboo when no argument on the merits is available. The letter of May 25th, on which Petitioner lays great stress clearly, says:

"The Alley Dwelling Authority has made a finding that * * * (R. 35)." The Alley Dwelling Authority failed to make

any findings. Instead the Regional Director capriciously and arbitrarily made his omnibus ruling. That was not his function. If other Government representatives have adopted the same high handed attitude in other instances, which we doubt, then it is about time that they too realize that in their contractual dealings they must apply the same rule of fairness which the law requires when private citizens deal with one another.

It is respectfully submitted that this case rests on its own facts and involves no basic principles which require the review of this Court.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

August , 1948.

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CERTIORARI DENIED